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2
3 CALVARY CHAPEL SAN JOSE, et al.,
4 Plaintiffs,
5 v.
6
7 SARA CODY, et al.,
8 Defendants.

9 Case No. 20-cv-03794-BLF
10
11

**ORDER DENYING APPLICATION
FOR TEMPORARY RESTRAINING
ORDER**

[Re: ECF 42]

12
13 ““Our Federalism,’ born in the early struggling days of our Union of States, occupies a
14 highly important place in our Nation’s history and its future.” *Younger v. Harris*, 401 U.S. 37, 44-
15 45 (1971). Our Federalism, as articulated by Justice Black, represents “a system in which there is
16 sensitivity to the legitimate interests of both State and National Governments, and in which the
17 National Government, anxious though it may be to vindicate and protect federal rights and federal
18 interests, always endeavors to do so in ways that will not unduly interfere with the legitimate
19 activities of the States.” *Id.* at 44. Amidst the struggling days of the COVID-19 pandemic,
20 Plaintiffs Calvary Chapel San Jose, Southridge Baptist Church, Mike McClure, and Micaiah
21 Irmler (collectively, “Plaintiffs”) ask this Court to disregard Our Federalism and seek a temporary
22 restraining order to enjoin 1) enforcement of a preliminary injunction issued by a state court that
23 Plaintiffs have blatantly flouted and 2) the ongoing state court proceedings. *See Appl. for TRO,*
24 ECF 42. After considering the Parties’ briefing and oral arguments on December 17, 2020, the
25 Court finds it inappropriate to interfere with the Santa Clara County Superior Court proceedings
26 and invokes the *Younger* abstention doctrine. Accordingly, Plaintiffs’ application for a temporary
27 restraining order is DENIED.
28

1 **I. BACKGROUND**

2 Every person in the United States is aware of the COVID-19 pandemic, the highly
3 contagious nature of the disease, and the steps public health officers, states, and municipalities
4 across the county have recommended to slow its deadly and destructive path. *See Decl. of Sara H.*
5 *Cody (“Cody Decl.”) ¶ 6, ECF 55-1.* Defendants Sara Cody, the Santa Clara County Public Health
6 Officer; Erica Pan, the Acting California Public Health Officer; Gavin Newsom, the Governor of
7 California; Santa Clara County Supervisors Mike Wasserman, Cindy Chavez, Dave Cortese,
8 Susan Ellenberg, and Joe Simitian; and the County of Santa Clara (collectively, “Defendants”)
9 have relied on evolving scientific knowledge and data to implement countywide and statewide
10 measures to curb the spread of COVID-19. *Decl. of Marc Lipsitch (“Lipsitch Decl.”) ¶ 24, ECF*
11 *55-2.* Defendants, by their own admission, have decided to ignore the State and County public
12 health orders. *See Decl. of Mike McClure (“McClure Decl.”) ¶¶ 2, 3, 9, ECF 43.*

13 Plaintiffs resumed holding indoor religious services for 800-1000 people every Sunday
14 starting on May 31, 2020. *McClure Decl. ¶¶ 2, 3.* Plaintiffs initially filed their complaint in this
15 Court on June 9, 2020, alleging violations of the First Amendment’s Free Exercise and
16 Establishment Clauses, as well as a violation of their right to privacy under the California
17 Constitution. *See Compl., ECF 1.* Plaintiffs did not serve Defendants until June 25, 2020. *See*
18 *Executed Summons, ECF 6-11.* One day earlier, on June 24, 2020, Santa Clara County (“the
19 County”) received an anonymous report of violations at the church. *See Ex. N, Anonymous*
20 *Written Complaint 274, ECF 56.* Concerning Calvary Chapel San Jose, the author wrote, “I have
21 gone there. The place is full, no masks and no social distancing.” *Id.* On August 11, 2020, the
22 County Board of Supervisors adopted Urgency Ordinance No. NS-9.921, declaring violations of
23 the COVID-19 public health orders a public nuisance and authorizing civil administrative fines for
24 violations. *First Am. Compl. (“FAC”) ¶ 63, ECF 38.* On August 21, 2020, the County hand
25 delivered a cease-and-desist letter to Calvary Chapel San Jose. *Ex. M, Tr. of October 21, 2020*
26 *County Administrative Appeal Hearing (“Hearing Transcript”) 32:10-23, ECF 56; Decl. of*
27 *Melissa Gonzalez (“Gonzalez Decl.”) ¶ 8, ECF 55-3.* The letter demanded that Calvary Chapel
28 San Jose immediately cease holding indoor gatherings; require participants to wear face coverings,

1 maintain social distance, and refrain from singing; and submit a County-required social distancing
2 protocol. Gonzalez Decl. ¶ 8. Calvary Chapel San Jose ignored the letter and continued to host
3 large indoor gatherings with no mask or social distancing enforcement. *Id.* ¶¶ 9-74. For instance,
4 on Sunday, August 23, 2020, a County enforcement officer entered Calvary Chapel San Jose and
5 observed singing and “at least 100 people in the church who were not wearing face coverings and
6 not maintaining a distance of at least 6 feet apart.” *Id.* ¶ 3, 10. In contrast, the enforcement officer
7 noted that a church next to Calvary Chapel San Jose was holding an outdoor worship service and
8 that attendees were wearing face coverings and maintaining a minimum of six feet of social
9 distancing, in compliance with the public health orders. *Id.* ¶ 9.

10 This evidence is undisputed—Plaintiff Mike McClure, the lead pastor at Calvary Chapel
11 San Jose, stated that the church has been holding indoor services since May 31, 2020, and plans to
12 continue to do so. McClure Decl. ¶¶ 1, 3, 9. McClure additionally stated that he “advised” people
13 inside the church to social distance and wear face masks and that the Church “provides” masks at
14 the entrance, but there is no mention of enforcing these safety measures. *Id.* ¶ 11. This stands in
15 stark contrast to the facts of *Roman Catholic Diocese of Brooklyn v. Cuomo*, where the Court
16 noted that the plaintiffs, who are houses of worship, “have complied with all public health
17 guidance, have implemented additional precautionary measures, and have operated at 25% or 33%
18 capacity for months without a single outbreak.” ---- U.S. ----, 2020 WL 6948354, at *2 (Nov. 25,
19 2020).

20 As a result of Calvary Chapel San Jose’s noncompliance with the cease-and-desist letter,
21 the County enforcement officers began issuing notices of violation to the church each time it held
22 an indoor gathering in violation of the public health orders. Gonzalez Decl. ¶¶ 9-74. Calvary
23 Chapel San Jose appealed the notices of violation and associated fines, and an administrative
24 hearing was held on October 21, 2020. *See* Hearing Transcript. At the hearing, Calvary Chapel
25 San Jose indicated that it intended to continue its noncompliant indoor gatherings as the County
26 continued to issue fines. Hearing Transcript 117:21-119:14. The hearing officer upheld the fines
27 and stated on the record that “It just seems to me that the church sort of just thumbed its nose at
28 the County, saying, ‘We’re just going to keep on doing what we’re doing, and we don’t care what

1 the law is.’ We can’t have that. We have to have compliance with the law.” *Id.* 120:9-14, 120:20-
2 121:4.

3 Before even receiving the anonymous complaint on June 24, 2020, the County had been in
4 an informal dialogue with counsel for Calvary Chapel San Jose in attempt to secure the church’s
5 voluntary compliance with the State and County public health orders. Declaration of Jeremy A.
6 Avila (“Avila Decl.”) ¶¶ 3-6, ECF 56. The conversations started in May, and by September the
7 County offered Calvary Chapel San Jose a proposal to resolve the violations and bring the church
8 into compliance. *Id.* ¶¶ 4-5. Calvary Chapel San Jose declined the proposal on September 30,
9 2020. *Id.* ¶ 5.

10 With efforts at voluntary compliance and amicable resolution proving futile, the County
11 counsel and Santa Clara County District Attorney jointly initiated an enforcement action against
12 Calvary Chapel San Jose and McClure in Santa Clara County Superior Court on October 27, 2020.
13 Ex. O., Compl., ECF 56. The complaint alleged two state causes of action: 1) violation of State
14 and County public health orders and 2) public nuisance. *See id.* On October 29, 2020, the state
15 court plaintiffs filed an ex parte request for a temporary restraining order, which Calvary Chapel
16 San Jose opposed by asserting federal constitutional defenses. *See Ex. L, State Court Docket, ECF*
17 56; *Ex P., Decl. of Mike McClure in Opp’n to Defs’ Ex Parte Appl. for TRO, ECF 56.* After a
18 November 2, 2020 hearing, the state court granted the temporary restraining order and enjoined
19 Calvary Chapel San Jose and McClure from conducting any gathering that did not comply with
20 both the State and County public health orders and operating indoors or outdoors without the prior
21 submission and implementation of a social distancing protocol. *Ex. B., November 2, 2020 Order,*
22 *ECF 42-2.*

23 As the County’s investigation and informal efforts to obtain voluntary compliance
24 continued, the County filed a motion to dismiss the federal action on July 17, 2020. *See Mot., ECF*
25 17. On November 5, 2020, this Court held a hearing on the motion to dismiss and issued a written
26 order on the same day dismissing all claims with leave to amend. *Order, ECF 30.* This case was
27 without an operative complaint until Plaintiffs filed their amended complaint on November 25,
28 2020. *See FAC.*

1 Calvary Chapel San Jose ignored the November 2 state court temporary restraining order
2 and continued to hold indoor gatherings that violated the order every day. Gonzalez Decl. ¶¶ 36-
3 74. On November 24, 2020, the state court issued an Order to Show Cause against Calvary Chapel
4 San Jose and McClure and set a hearing for contempt proceedings. *See State Court Docket.* On the
5 same day, the state court issued a modified temporary restraining order at the request of the
6 County due to the change in public health orders based on the increased number of COVID-19
7 infections in the County. *See Id;* Order (“State Court Order”) 2, ECF 42-5. On December 1, 2020,
8 the state court held a hearing on the County’s request for a preliminary injunction, and that was
9 granted in a written order on December 4, 2020. Minute Order, ECF 42-4; State Court Order.
10 Superior Court Judge Peter H. Kirwan considered the federal constitutional arguments advanced
11 by Calvary Chapel San Jose and McClure and the Supreme Court’s newly issued guidance in
12 *Diocese of Brooklyn*, and he decided that the issuance of a preliminary injunction requiring
13 Calvary Chapel San Jose and McClure to comply with existing public health orders was
14 appropriate. State Court Order 7-8.

15 At the contempt hearing on December 8, 2020, the state court held Calvary Chapel San
16 Jose and McClure in contempt for violating the November 2 temporary restraining order and
17 ordered them to pay \$55,000 in fines. Opp’n 9, ECF 55. Plaintiffs’ counsel confirmed the amount
18 of the fine at this Court’s December 17, 2020 hearing.

19 Against this backdrop, Plaintiffs filed an ex parte application for a temporary restraining
20 order in this Court on December 8, 2020. *See Appl.* for TRO. Plaintiffs ask this Court to enjoin
21 Defendants from “enforcing the Preliminary Injunction in the matter of *the People of the State of*
22 *California, et al. v. Calvary Chapel San Jose, et al.*, Case No. 20CV372285, or any such other
23 future orders from the Superior Court limiting, barring, or prohibiting indoor religious assembly
24 and indoor religious singing(worship) against Plaintiffs or otherwise interfering with Plaintiffs’
25 religious gatherings.” Proposed Order, ECF 42-9. In effect, Plaintiffs ask that they be exempt
26 from all public health restrictions. The Court ordered Defendants to respond to Plaintiffs’ filing by
27 December 14, 2020. *See Order*, ECF 51. At the Court’s invitation, Plaintiffs submitted a reply
28 brief on December 16, 2020. *See Reply*, ECF 62. The Court heard oral argument from the Parties

1 on December 17, 2020.
2

3 **II. LEGAL STANDARD**

4 Preliminary injunctive relief, whether in the form of a temporary restraining order or a
5 preliminary injunction, is an “extraordinary and drastic remedy,” that is never awarded as of right.
6 *Munaf v. Geren*, 553 U.S. 674, 689-690 (2008) (internal citations omitted). The standard for
7 issuing a temporary restraining order is identical to the standard for issuing a preliminary
8 injunction. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.
9 2001); *Lockheed Missile & Space Co. v. Hughes Aircraft*, 887 F. Supp. 1320, 1323 (N.D. Cal.
10 1995). An injunction is a matter of equitable discretion and “may only be awarded upon a clear
11 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Resources Defense Council,*
12 *Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking preliminary injunctive relief must establish “[1]
13 that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the
14 absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an
15 injunction is in the public interest.” *Id.* at 20. “[I]f a plaintiff can only show that there are serious
16 questions going to the merits – a lesser showing than likelihood of success on the merits – then a
17 preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff’s
18 favor, and the other two Winter factors are satisfied.” *Friends of the Wild Swan v. Weber*, 767
19 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks and citations omitted).

20
21 **III. DISCUSSION**

22 This Court is mindful that its “obligation to hear and decide a case is ‘virtually
23 unflagging.’” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citing *Colorado River*
24 *Water Conservation Distr. v. United States*, 424 U.S. 800, 871 (1976)). An exception to this
25 general rule is the doctrine of abstention, which involves “a decision by a federal court to decline
26 to exercise jurisdiction over the underlying claims for reasons of comity.” *Washington v. Los*
27 *Angeles Cty. Sheriff’s Dep’t*, 833 F.3d 1048, 1058 (9th Cir. 2016) (citations omitted). In civil
28 cases, *Younger* abstention is appropriate where a state court proceeding

(1) is ongoing; (2) is a quasi-criminal enforcement action or involves a state's interest in enforcing the orders and judgments of its courts; (3) implicates important state interests; (4) provides an adequate opportunity to raise federal challenges; and (5) would be enjoined by the federal court action or where the federal proceeding would have the practical effect of doing so, and no exception to Younger applies.

Bristol-Myers Squibb Co. v. Connors, 444 F. Supp. 3d 1231, 1234 (D. Haw. 2020) (citing *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018)), *aff'd*, 979 F.3d 732 (9th Cir. 2020). “Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed.” *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970). The Supreme Court has held that abstention is appropriate with respect to Superior Court contempt proceedings. *See Juidice v. Vail*, 430 U.S. 327, 336 (1977) (“federal-court interference with the State’s contempt process is an offense to the State’s interest . . . likely to be every bit as great as it would be were this a criminal proceeding.”) (alteration in original) (quotations and citation omitted); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (applying *Juidice*’s holding that a federal court should have abstained from adjudicating a challenge to a State’s contempt process).

Plaintiffs do not contest that the state court proceeding is an enforcement action, implicates important state interests, provides an opportunity to raise federal challenges, and would be enjoined by the federal court action. Indeed, the Court in *Diocese of Brooklyn* recently affirmed that “[s]temming the spread of COVID-19 is unquestionably a compelling state interest.” 2020 WL 6948354, at *2. In their reply brief, Plaintiffs challenge whether the state court proceedings are “ongoing” as required under *Younger*. While “[a]rguments raised for the first time in a reply brief are waived,” *Autotel v. Nevada Bell Tel. Co.*, 697 F.3d 846, 852 n.3 (9th Cir. 2012) (citation omitted), the Court nonetheless finds that the state court proceedings are, in fact, ongoing, as a preliminary injunction is just the beginning, not the end, of a case. The County confirmed this at the December 17, 2020 hearing by informing the Court that it has begun serving discovery requests in the state court action. Moreover, the Court finds that the case Plaintiffs cite to support their argument that the state court proceedings are not “ongoing,” *Hicks v. Miranda*, 422 U.S. 332,

1 349 (1975), actually supports the opposite conclusion. In *Hicks*, the Court held, “where state
2 criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but
3 before any proceedings of substance on the merits have taken place in the federal court, the
4 principles of *Younger v. Harris* should apply in full force.” *Id.* This federal case has not yet
5 advanced past the pleadings stage, and there was no operative complaint in this case when the
6 state court set the contempt hearing.

7 Plaintiffs argue that there are extraordinary circumstances here that merit an exception to
8 *Younger* abstention. Appl. For TRO 6-7. Federal courts will decline to abstain under *Younger* in
9 “extraordinary circumstances where irreparable injury can be shown.” *Brown v. Ahern*, 676 F.3d
10 899, 903 (9th Cir. 2012). Irreparable injury alone, without a showing of great and immediate need,
11 is not enough. *Younger*, 401 U.S. at 46. “The very nature of ‘extraordinary circumstances,’ of
12 course, makes it impossible to anticipate and define every situation that might create a sufficient
13 threat of such great, immediate, and irreparable injury.” *Moore v. Sims*, 442 U.S. 415, 433 (1979)
14 (quoting *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975)). “But whatever else is required, such
15 circumstances must be ‘extraordinary’ in the sense of creating an *extraordinarily pressing need for*
16 *immediate federal equitable relief*, not merely in the sense of presenting a highly unusual factual
17 situation.” *Moore*, 442 U.S. at 433 (quoting *Kugler*, 421 U.S. at 125) (emphasis added).

18 Plaintiffs have not presented any evidence demonstrating an extraordinary circumstance—the
19 Court certainly cannot make that determination based on Plaintiffs’ argument that “[t]his is a
20 know it when you see it situation.” Appl. For TRO 7. Plaintiffs cite *Diocese of Brooklyn* for the
21 proposition that “[t]he loss of First Amendment Freedoms, for even minimal periods of time,
22 unquestionably constitutes irreparable injury.” 2020 WL 6948354, at *3 (quoting *Elrod v. Burns*,
23 427 U.S. 347, 373 (1976) (plurality opinion)). *Diocese of Brooklyn*, though, did not involve
24 abstention and did not evaluate what constitutes an “extraordinary circumstance” under *Younger*.
25 Plaintiffs have not cited, and this Court is not aware of, any Supreme Court or Ninth Circuit case
26 holding that all First Amendment challenges are extraordinary and immediate under
27 *Younger*. Absent additional evidence, the Court declines to make such a finding on this record,
28 Accordingly, the Court finds that no exception to *Younger* applies, and the Court will abstain from

1 enjoining the state court proceedings and enforcement action.

2

3 **IV. ORDER**

4 The Court acknowledges the importance of First Amendment freedoms, as recently
5 reiterated by the Supreme Court in *Diocese of Brooklyn* and the Ninth Circuit in *Dayton Valley v.*
6 *Sisolak*, ---- F.3d ----, 2020 WL 7350247, at *3 (9th Cir. Dec. 15, 2020). The First Amendment,
7 though, is not the issue before this Court on this narrowly focused temporary restraining order
8 seeking to enjoin the state court proceedings. Our Federalism properly places this dispute in the
9 more-than-capable hands of the Santa Clara County Superior Court. The asserted claims in this
10 federal action are not affected by this order.

11 Plaintiffs' application for a temporary restraining order is DENIED.

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13 Dated: December 18, 2020



14
15 BETH LABSON FREEMAN
16 United States District Judge